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Mary B. Griffin
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February 9, 2009

Courtney Feeley Karp, Esquire
Department of Energy Resources
100 Cambridge Street, Suite 1020
Boston, MA 02108

Re: Comments of the Department of Fish and Game on DOER's proposed
final RPS regulations

Dear Ms. Feeley Karp:

The Department of Fish and Game ("DFG") hereby submits the following comments on the Department of Energy Resources ("DOER") Renewable Energy Portfolio Standard Regulations at 225 CMR 14.00 ("RPS I") and 225 CMR 15.00 ("RPS II"). The RPS I and RPS II regulations were promulgated by DOER on January 1, 2009 on an emergency basis and are now being proposed as final permanent regulations by DOER.

At the outset, DFG appreciates the pro-active efforts of DOER to solicit and consider DFG's input on the RPS regulations prior to their promulgation as emergency regulations. As part of that consultation process, DFG provided DOER with comments and related language on the regulations, some of which was addressed by DOER. Our comments on the proposed final regulations essentially restate the remaining comments that are not reflected in emergency or final regulations. For the reasons summarized below, DFG continues to believe that our suggested changes will result in a workable regulatory scheme that is consistent with the intent and language of the Green Communities Act (the "Act"), the statute governing these DOER regulations.

Specific Comments

1. Circumstances where consultation with relevant agencies should be required, notwithstanding LIHI certification

In both 225 CMR 14.05(1)(a)6.d.i of the RPS I regulations and 225 CMR 15.05(1)(a)6.d.i of the RPS II regulations, a Unit can demonstrate compliance with the hydroelectric eligibility criteria by obtaining LIHI certification, except in the following two circumstances:

A. If a Relevant Hydroelectric Agency identified an environmental concern and a proposed remedy to LIHI during the LIHI certification process, and such concern was not addressed in the LIHI certification to the satisfaction of the Agency, *and the Agency consulted with the Owner or Operator of the Unit.* (Emphasis added).

B. If, between issuance of the LIHI certification and the Department's determination of the Unit's eligibility, a Relevant Hydroelectric Agency submits to the Department evidence of a significant environmental problem not previously known by such Agency, *after consulting with the Owner or Operator of the Unit.* (Emphasis added).

The Act expressly requires DOER to consult with relevant federal and state agencies before it makes a final decision under its RPS regulations. While DFG generally favors an approach where obtaining LIHI certification demonstrates a facility's compliance with the DOER eligibility criteria, the applicable regulatory language should not have the effect of limiting the relevant agencies' statutory right to be consulted.

Regarding the highlighted language in A. and B., DFG does not believe that the obligation on DOER to consult with a relevant agency in the above circumstances should be contingent on whether the agency also consulted with the Owner or Operator of the Unit. Although DFG would endeavor to have that consultation, the reality is that for timing or other practical reasons, it may not happen in every case. DFG should not lose its right to weigh in with DOER on a continuing environmental concern simply because it was unable to first "consult" with the Owner or Operator of the Unit. For these reasons, DOER should delete the italicized language in the final version of the RPS I and RPS II regulations.

For similar reasons, DOER should amend the above referenced regulatory sections to also require DOER to consult with a relevant agency in circumstances where the agency, due to a lack of notice, or time or staff constraints, was unable to comment to LIHI during its certification process. Again, while DFG is committed to actively and consistently commenting during the LIHI certification process, the uncertainty about the magnitude and timing of these certifications in light of existing and potential staffing constraints warrants addressing this potential scenario in the DOER regulations. DFG therefore requests that the following circumstances also require DOER to consult with a relevant agency before DOER makes a final eligibility decision under the RPS regulations:

“If a Relevant Hydroelectric Agency, due to a lack of notice, or time or staffing constraints, did not comment to LIHI during its certification process.”

Finally, the above referenced regulatory sections also establish categorical 30 day response deadlines that are applicable to both relevant consulting agencies and Unit Owners/Operators. Because these are regulatory deadlines, DFG believes that it is in the best interests of DOER, the Unit Owners/Operators and the relevant consulting agencies to preserve flexibility in the regulations to allow more time to respond in appropriate cases. More specifically, these parties should have an opportunity under the regulations to request a time extension, e.g., to account for instances where the nature or complexity of potential concern(s) reasonably require more time to evaluate, consult on and/or respond to. The regulations can make clear that DOER decides whether to grant a time extension, although we recommend that the regulations state that the grant of a time extension shall not be unreasonably withheld by DOER.

2. Consultation with Relevant Consulting Agencies when Owner/Operator has not obtained LIHI certification

225 CMR 14.05(1)(a)6.f. and g. of the RPS I regulations and 225 CMR 15.05(1)(a)6.f. and g. of the RPS II regulations address scenarios where an Owner/Operator who has not obtained certification from LIHI can petition DOER directly for a Statement of Qualifications. The language in both of the above referenced regulatory sections should be revised to expressly require DOER to consult with the relevant agencies before making a final determination as to whether the Unit meets the environmental standards specified in the regulations.

2. Definition of “Impacted Watershed”

To ensure that the definition of “Impacted Watershed” in both 225 CMR 14.02 of the RPS I regulations and 225 CMR 15.02 of the RPS II regulations is sufficiently broad to accomplish the purposes of the Act, DFG requests it expressly include “areas of land” and that the definition state more generally that such water bodies or areas of land be “hydrologically connected to a hydroelectric facility,” (rather than the more narrow language of “connected to a water body impounded by a hydroelectric facility”). Finally, the word “may” should be inserted between the words “which” and “experience” to avoid an implication that the applicant alone determines whether a watershed is experiencing an alteration that causes an impact. The revised definition would read as follows:

Impacted Watershed. All water bodies or areas of land hydrologically connected to a hydroelectric facility, whether located upstream or downstream, which may experience any alteration of their physical, biological, or ecological characteristics as a result of the operation or increased capacity expansion of a Generation Unit.

3. Definitional Term for Consulting Agencies

The definition of “Relevant Hydroelectric Agency” in both 225 CMR 14.02 of the RPS I regulations and 225 CMR 15.02 of the RPS II regulations is as follows:

A federal, state or provincial agency with oversight over fish and wildlife, water quality, river flows, fish passage and protection, mitigation and enhancement opportunities, related to a hydroelectric facility located in the Impacted Watershed or that impacts downstream or upstream passage of fish and wildlife.

DFG has no concern about the substance of the above definition. However, calling such consulting natural resource agencies "Relevant *Hydroelectric* Agencies" is confusing. Consistent with a comment made by the Department of Environmental Protection ("DEP") during the development of the emergency regulations, DFG believes that it is clearer and more appropriate to use the term "Relevant Natural Resource Agencies."

Finally, the heading in 225 CMR 15.05 incorrectly refers to "Class I" rather than "Class II."

Thank you again for DOER's consideration of DFG's input on the RPS regulations. If you have any questions concerning DFG's comments, please contact me at (617) 626-1552.

Sincerely,

A handwritten signature in black ink that reads "Richard Lehan". The signature is written in a cursive style with a small mark above the 'i' in "Richard".

Richard Lehan
General Counsel

cc: Mary Griffin, Commissioner, DFG
Deirdre Desmond, DEP